

THE PROSECUTOR’S MANUAL

CHAPTER 9

OPENING STATEMENTS

Table of Contents

I. Introduction	1
II. Importance of the Opening Statement	1
III. Purpose and Scope	1
A. United States Supreme Court	1
B. Arizona Supreme Court	1
IV. Rapport with the Jurors	1
A. Sincerity.....	1
B. Confidence and Control	2
V. Theories of Presentation	2
A. Procedural Theories of Presentation	2
1. The “Bare-bones” Outline	2
2. Telling It All	2
3. Omitting Selected Details	2
B. Substantive Theories of Presentation	2
1. Opening your Opening	2
2. Disabusing the Jurors of Popular Notions	4
3. Telling the Story	4
a. Be Sure	4
b. Rehearse	4
c. Speak in Active Tense	5
d. Tell the Story in Chronological Order	5
e. Visualization	5
(1) What is it?	5

(2) The Pictures you Create Should Be Concrete and Graphic	5
(a) All Words of the Story Should Represent Pictures	5
(b) Speak in the Most Concrete Terms Possible	5
(c) Speak Graphically	5
(d) Personalize the Victim	5
f. Try Telling your Story Without Memorizing It	6
4. Closing your Opening	6
VI. Just the Facts	6
A. Facts to Memorize	6
B. Never Overstate your Evidence: If at All Possible, Understate It	6
C. Do Not Discuss “Defense Facts” Except... ..	6
1. The Defense Case	6
2. Weaknesses in the State’s Case	7
D. Do Not Argue	7
E. Never Refer to Inadmissible Evidence	7
F. The Defense Attorney’s Opening	7
1. Objecting	7
a. Judgment Calls	7
b. Demeanor	7
c. Specific Objections	8
2. Take Notes	8
VII. Development of a Theme	8
VIII. Sensory Aids	8
IX. The Defense Opening - Reserving	9
A. Preview of the Defense Case	9
B. Credibility	9
1. Admissions	9
2. Inconsistent	9

I. INTRODUCTION

This Chapter discusses some techniques which may be helpful to beginning prosecutors in the presentation of their opening statements to juries.

II. IMPORTANCE OF THE OPENING STATEMENT

Social, research reflects, and many prosecutors agree, that 65-80% of jurors in criminal cases make up their minds about the guilt or innocence of the defendant immediately following opening statements.

Social scientists theorize that everyone makes first impressions and that, once embraced, these impressions become difficult to dislodge.

A word to the wise is sufficient: Do not underestimate the importance of your opening statement.

III. PURPOSE AND SCOPE

A. United States Supreme Court

An opening statement has a narrow purpose and scope. It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument. To make statements which will not or cannot be supported by proof is, if it relates to significant elements of the case, professional misconduct. Moreover, it is fundamentally unfair to an opposing party to allow an attorney, with the standing and prestige inherent in being an officer of the court, to present to the jury statements not susceptible of proof but intended to influence the jury in reaching a verdict.

United States v. Dinitz, 424 U.S. 600 (1976) (Burger, J. concurring).

B. Arizona Supreme Court

... The object of an opening statement is to apprise the jury of what the party expects to prove and prepare the juror's minds for the evidence which is to be heard. Also, the extent to which counsel is permitted to go in making his statement is within the discretion of the court. The rule of the court will only be disturbed when this discretion is abused.

State v. Prewitt, 104 Ariz. 326, 333, 452 P.2d 500, 507 (1969). Accord *State v. King*, 180 Ariz. 268, 276-78 P.2d 1024, 1032-34 (1994); *State v. Lee*, 110 Ariz. 357, 519 P.2d 56 (1974); *State v. Sucharew*, 205 Ariz. 16, 21, 66 P.3d 59, 64 (App. Div. 1 2003).

IV. RAPPORT WITH THE JURORS

Juries are seldom composed of people intimately familiar with the judicial system. Most, in fact, will be totally unsophisticated and lost in the courtroom. In short, jurors are usually looking for someone to identify with whom they trust. They will almost always identify with the judge. Often they will also identify either with the prosecutor or defense counsel early in the trial.

A. Sincerity

Most important to jurors is an attorney's sincerity in the presentation of the case. If jurors smell that they are being "put on" or "duped" on even one point they will justifiably disregard everything that attorney says.

B. Confidence And Control

It is very important in the identification process that the jurors at a very early stage perceive the prosecutor as competent and confident. (In this area, as in many others of trial work, the appearance is often more important than the reality.)

Having said that, every beginning prosecutor must be aware that there is often a thin line between exhibiting confidence and being an aggressive, overbearing jerk. Many jurors will have preconceived notions of attorneys coinciding with the latter characterization. Don't reinforce these notions by lecturing, talking "over the heads" of the jury, or acting like a "big shot". Talk to the jury, not at them.

V. THEORIES OF PRESENTATION

There are several basic procedural and substantive theories regarding the presentation of an opening statement. The following is but a summary of those theories and suggestions relating to them. Each beginning prosecutor must decide for him/her self which theory best fits his/her style.

A. Procedural Theories Of Presentation

1. The "Bare-Bones" Outline

Some prosecutors present only a "bare-bones" outline to the jury. These prosecutors then "fill in" the details during the course of the State's case-in-chief. This is usually a mistake or the result of inadequate preparation. A "bare-bones" outline is normally insufficient to get the jury on your side or convinced of the defendant's guilt.

2. Telling It All

Some experienced prosecutors pull out "all stops" and tell jurors every detail of the evidence they intend to present.

The prosecutor who adopts this approach takes a great chance that he will bore the jury with details or leave the jury with nothing to listen for in the State's case.

Many experienced prosecutors advise beginning prosecutors that it is better at first to err on the side of brevity.

3. Omitting Selected Details

For most good prosecutors the best approach is to be brief and to the point, while giving the jurors some "meat" to chew on. Many prefer, if possible, to leave a bit of suspense for the trial. A beginning prosecutor, when using this tactic, might tell the jury that ". . . what happened next is very important (or interesting, etc.); I'd ask you to listen carefully to it."

B. Substantive Theories Of Presentation

1. Opening Your Opening

It is almost a consensus among prosecutors that the first minute of your opening statement should usually be related by rote.

The reason for this is that your opening is usually your first opportunity to speak directly to the jury. A memorized, but animated, beginning gives you an opportunity to get rid of possible pre-trial jitters, get eye contact with the jurors and impress the jurors with your eloquence without having to worry about getting confused or disoriented.

Some or all of the following suggestions may fit your individual style.

- a. (Re)introduce yourself.
- b. Explain your responsibilities.
- c. Thank the jurors.
- d. Tell the jurors the importance of their roles.
- e. Apologize in advance for expected delays, inconveniences, or the fact that you won't be able to talk with them during the trial.
- f. Explain the roles of everyone in the courtroom (e.g. the court reporter). Do not use this technique if the judge has already explained some of the rules. Some attorneys who are good at this immediately appear to the jury to be the master of ceremonies for all the activity to take place.
- g. Explain that what you (and defense attorney) say is not evidence.
 - (1) Many prosecutors use this technique when they know the defense attorney is a "testifier" (on objections, in closing, etc.).
 - (2) Jurors are not going to know what "evidence" is, so you probably ought to tell them that it is the testimony of the witnesses from the witness stand and any items which the judge allows you to see (may want to give example).
- h. Explain all parts of the trial (if the judge has not already done so) from opening statement to jury instructions and deliberations.
- i. Explain what an opening statement is (e.g. "birds-eye" view of what the testimony will be; outline of testimony, overview of testimony you will hear from the witness stand, etc.).
- j. Analogies and metaphors

Many attorneys like to draw an analogy between a trial and events with which the jury is familiar. Although this technique can be very effective for most attorneys, it can be disastrous for the inexperienced prosecutor. For example, comparing a trial to a jigsaw puzzle and explaining how all the pieces will fit together can draw the response in closing that a puzzle with a piece missing raises a reasonable doubt. (The experienced prosecutor's rejoinder is normally that even with many pieces missing anyone can still see what the picture

depicts.)

Another caveat is that if you use the same metaphor or analogy for every trial, an enterprising defense attorney will think up a foil (see, Visualization).

k. Proof beyond a reasonable doubt

Most prosecutors explain that they have the burden of proving the defendant guilty beyond a reasonable doubt and that they gladly accept that burden.

Some prosecutors go further and discuss reasonable doubt, in order to "draw the sting" of the defense attorney's opening. This can be a mistake in that it may be objectionable as outside the scope of opening statement. Even worse, it may open the door to an eight-hour dissertation by defense attorney on the subject. Because most defense attorneys would much rather talk about the burden of proof than the facts, you're usually playing into their hands by making it a battleground.

2. Disabusing the Jurors of Popular Notions

Most jurors want and expect to be entertained. You may want to let them know that this is not CSI. Otherwise, they may blame their failure to be entertained on you.

3. Telling the Story

It may help you to think of the courtroom as a "stage". Don't be afraid to use the various backdrops and props which are at your disposal. Depending on the type of case, it can be quite effective to move around during your opening. However, don't do anything that you are not comfortable with. To carry the "stage" metaphor a bit further, don't do anything unless there is a reason to do it. Purposeless arm-waving impresses nobody. Remember - your opening represents a chance to sell yourself and your case to the jury.

The "heart" of your opening statement will be an explanation of what the evidence will be. This must be told like a story.

The most important skill a prosecutor can develop in order to present an effective opening statement is the ability to tell a story.

Some suggestions in developing this art:

a. Be sure

First, you must convince yourself of the defendant's guilt. A jury cannot be expected to render a guilty verdict unless you display an attitude which says unequivocally, "this man is guilty."

b. Rehearse

Rehearsing your opening will help you be more comfortable and believable at trial. By doing it in front of non-lawyer family or friends, you can receive valuable feedback. Find out if there is anything else that they would like to hear. They, like the jury, will be totally unfamiliar with the case. This enables them to point at things which you, due to your familiarity with the case, take as "given". If you cannot

get a live audience, try a mirror. Every little bit helps.

- c. Speak in Active Tense
- d. Tell the Story in Chronological Order

Usually, the story will flow much better if you tell it in chronological order.

- e. Visualization

A powerful tool which all great story tellers and lawyers use is visualization.

- (1) What is it?

Visualization involves the transfer of the visual image in the prosecutor's mind to that of each juror.

Visual images are PICTURES.

- (2) The pictures you create should be concrete and graphic.

In order to transfer these pictures to the jurors' minds, a prosecutor must prepare his opening statement in the most concrete, graphic words possible. Both in opening and closing you must make the jury feel as if they are at the scene of the crime.

- (a) All words of the story should represent pictures.

Phrases such as the "record will reflect . . ." or "Mr. Jones will testify . . ." are both distracting and fail to paint the pictures you are trying to create in the jurors minds.

- (b) Speak in the most concrete terms possible.

Most jurors are more interested in and will identify better with the details. For example, it is better to say that, "Mary Jones was watching 60 Minutes" rather than "T.V.".

- (c) Speak graphically.

Trial advocacy, even in the opening statement, generally calls for graphic illustrations rather than euphemisms. This is especially true when the crime is one of violence. For example, the prosecutor in *State v. Turrubiates*, 25 Ariz. App. 234, 239, 542 P.2d 427 (App. Div. 2 1975), emphasized in his opening that the defendant "smashed" his baby against the crib. The Court of Appeals saw nothing wrong with this characterization. In another case, the prosecutor described the victims as "cowering, hiding, and praying to God Almighty" while saying the defendant appeared "outraged, beyond control, and absolutely terrifying." *State v. Philips*, 202 Ariz. 427, 437, ¶ 47, 46 P.3d 1048, 1058 (2002).

- (d) Personalize the victim.

Tell the victim's story -- make the victim a real person. All too often the victim remains a faceless name throughout the trial. Convey the idea that the crime did not occur in a vacuum. Rather, it occurred in the real world and had real consequences.

f. Try Telling Your Story Without Memorizing It

Prosecutors disagree on whether opening statements should be read, memorized or spoken spontaneously.

It is generally the case, however, that if you have firmly marshaled the facts of the case, your story of the facts of the case, is much more interesting and genuine if accomplished without memorization.

4. Closing Your Opening

Many prosecutors "trail off" at the end of their opening statement. Some even start to sit down during their last sentence. This is a big mistake.

In the first cases you prosecute, memorize the final portions of your opening statement and memorize the transitional sentence between your "story" of facts of the case and your closing. For example, you might want to say, "you will hear (or "I will present") a lot of other testimony which will prove to you beyond a reasonable doubt that the defendant committed this crime." Your last sentence should usually be a sincere and firm request to find the defendant guilty.

VI. JUST THE FACTS

As stated earlier, the "legal" purpose of the opening statement is to tell the jury the facts. The following are some suggestions in the stating of those facts.

A. Facts To Memorize

Memorize all important names, dates and locations. A jury will lose confidence in an attorney who must fumble through his notes to locate this information.

The defendant should be referred to by his last name or as the defendant.

B. Never Overstate Your Evidence; If At All Possible, Understate It

Every experienced prosecutor has at one time or another had to "eat" a portion of his opening statement. This occurs most frequently when a prosecutor fails to carefully prepare his case or opening and assumes witnesses will testify in a certain manner or exaggerates in order to impress upon the jury the strength of his case.

The effect of prosecutor's failure to prove everything he promised in opening statement can be devastating.

In the hands of a competent defense attorney, the jury can be persuaded:

1. That the prosecutor failed to prove his case (even though the misstatement was not an element of the crime).
2. That what the prosecutor says is not worthy to believe because he misstated the facts in opening.

C. Do Not Discuss "Defense Facts" Except . .

1. The Defense Case

Some attorneys discuss the case which they expect the defense to present and explain to the jury how the State's evidence will rebut the defense. This is almost always a mistake in that it is objectionable. If the defense does not object, it is usually because the prosecutor is bolstering the defense case by emphasizing "defense facts" and thereby adding credibility and reinforcement.

Many of the best prosecutors are adept at handling expected defenses by implication during the opening. These prosecutors then refute the defense case more explicitly in direct examination.

2. Weaknesses in the State's Case

You must never fail to inform the jury of certain "weaknesses" in your case. For example, "problem" witnesses can be introduced to the jury. If one of your witnesses is particularly unsavory (criminal, someone you have to give immunity to, etc.) you have to "draw the sting" or get clobbered when the witness is finally called (it will look like you have "hidden" something). If a child witness is involved, tell the jury and ask for their patience during the testimony. Many prosecutors have found through skillful disclosure that often the witness' background has little effect on the jury.

D. Do Not Argue

You will have an opportunity to argue your case at the end of the trial. It is inappropriate and objectionable to argue during opening statement.

E. Never Refer To Inadmissible Evidence

If you have doubts regarding the admissibility of a piece of evidence, do not refer to it.

In *State v. Galioto*, 126 Ariz. 188, 613 P.2d 852 (App. Div. 2 1980), the prosecutor referred in opening to evidence which was later ruled inadmissible. Because the defense attorney failed to renew the objection which was made at the time of the opening statement when the court later ruled the evidence inadmissible, the court deemed the error waived.

A slight deviation between the evidence and the prosecutor's opening statement was held to not be reversible error in *State v. Silva*, 137 Ariz. 339, 670 P.2d 737 (App. Div. 2 1983). A caveat by the prosecutor that what he or she says is not evidence, will often prevent reversal if the evidence is inadvertently misstated. *State v. Thomas*, 130 Ariz. 432, 636 P.2d 1214 (1981) (reversed on other grounds).

In *State v. Dann*, 220 Ariz. 351, 363-64, ¶¶ 48-51, 207 P.3d 604, 616-17 (2009), the prosecutor presented photographs to the jury in his opening PowerPoint presentation. The court later precluded three of those photographs as cumulative, but because ultimately equivalent or even more graphic autopsy photographs were admitted, the court denied a mistrial.

F. The Defense Attorney's Opening

1. Objecting

a. Judgment Calls

A prosecutor must exercise good judgment in objecting during opening statement. Most objections will not be sustained and trying to rattle the defense attorney just isn't worth it.

b. Demeanor

Stand up when you object and object with authority. Whether your objection is sustained or overruled, act as if you won (e.g. by thanking the judge).

c. Specific Objections

Typical circumstances where an objection may be appropriate are when a defense attorney:

- (1) Begins to argue the merits of case. Arguments are supposed to come at the end of the trial; not the beginning ("objection, beyond the scope of opening"; "objection, counsel is arguing"; etc.).
- (2) Discusses the law. Explaining the law is the judge's job except during closing argument. ("Objection, beyond the scope of opening"; "Objection, explaining the law is an invasion of the province of the court").
- (3) Discusses "facts" which will not be admissible at trial. A "sneaky" tactic of some defense attorneys is to discuss information which he knows is inadmissible at trial but is very helpful to his client.

Following are two examples:

In an armed robbery case: "You will hear, ladies and gentlemen that Alfred (defendant) has never ever had a traffic ticket".

In a murder case: "You will hear evidence that will show another person named James Hanrahan was eyewitness to this case, to this shooting. You will hear that James Hanrahan describes the man who did the shooting as being a large African-American male with an afro, with no mustache, and you will hear that James Hanrahan said this man is not the man. That evidence you will hear was not utilized at the last trial. You will hear that the evidence was suppressed and hidden by the prosecutor in that case. You will hear that the evidence was purposely withheld. You will hear that because of the misconduct of the County Attorney at that time and because he withheld evidence, that the Supreme Court of Arizona granted a new trial in this case. That's what you will hear."

2. Take Notes

Many defense attorneys, in trying to convince the jury that the State's case is weak or the defendant's is strong, will overstate their facts.

Copy these statements and if possible, tell the court reporter to mark it so that you can make him eat his words during closing argument.

VII. DEVELOPMENT OF A THEME

Try to think of a theme or "buzz words" with respect to your case which you can continue to repeat throughout the trial.

VIII. SENSORY AIDS

A very impressive and effective method of presenting an opening statement is the use of sensory aids such as

drawings, graphs, large pictures, tape recordings, etc.

Prior to using sensory aids, however, be sure to inform your judge of the propriety of their use. For example, there is case law which allows the use in opening of movies which are subsequently properly identified and received in evidence. *People v. Green*, 47 Cal.2d 209, 302 P.2d 307 (1956). You may also use PowerPoint presentations in your openings to present photographs that are later admitted and to track the substance of your opening statement. *State v. Sucharew*, 205 Ariz. 16, 20-21, ¶¶ 5-7, 66 P.3d 59, 63-64 (App. Div. 1 2003); see also *State v. Dann*, 220 Ariz. 351, 363-64, ¶¶ 48-51, 207 P.3d 604, 616-17 (2009).

IX. THE DEFENSE OPENING - RESERVING

If an experienced defense attorney reserves his opening you may logically infer that the prosecutor's opening was probably not effective enough. Most defense attorneys, feel strongly that if the prosecutor made points on opening, they must respond.

The reasons why it is so important that you not allow the defense to reserve their opening statement are:

A. Preview Of The Defense Case

Often, because the State receives little disclosure of value from the defense, a prosecutor will not know the real defense theory until the opening statement. This knowledge, obtained as early as possible, you will prove invaluable in the presentation of your case.

B. Credibility

In order to maintain any credibility with the jury, the defense attorney must make certain admissions and let the jury know what the prosecution cannot prove.

1. Admissions

Defense admissions make it much easier to prove your case and also limit and crystallize the issues for the jurors.

2. Inconsistent

A good defense attorney will rarely argue alternative and never argue inconsistent defenses to a jury. If, however, an element of your case is weak and there is strong affirmative defense possible, the defense will see how well your case-in-chief goes before committing to a defense. This tactic is unlikely, however, if your opening is strong.